

Charges and Penalties

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I. INTRODUCTION



NUTS AND BOLTS APPROACH TO CHARGING

- A. Three Parts of a Charge
- B. Brief Overview of Evidence
- C. Framing of a Charge
- D. MSPB's Three Prong Test for Determining the Charge
- E. Types of Charges

Charging

- **Three Parts to a Charge**

1. Charge label
2. Specifications
3. Legal elements

- **Brief Overview of Evidence**

1. Real or Direct
2. Scientific
3. Circumstantial
4. Documentary



Charging *cont.*

- **Framing of the Charge**

1. Brevity
2. Clarity
3. Match the Caption with the charge



Charging *cont.*

● MSPB's Three Prong Test for Determining the Charge

1. What the agency *thinks* it is charging.
2. What the employee *thinks* they are charged with.
3. What the AJ *determines* the employee was charged with.

Types of Charges

1. Descriptive Charge
2. No Charge
3. Specification does not fit the Charge
4. Generic/Specific

II. TYPICAL/COMMON AGENCY CHARGES

Intentional vs. Non-Intentional Charges

Terms of art require additional elements of proof

ex. Theft – agency must show an intent to deprive the owner permanently of possession and use of his or her property.

King v. Nazelrod, 43 F.3d 663, 665-67 (Fed. Cir. 1994).

Conjunctive Label Charge

- Use of this charge with an element connoting intent requires proof of that element for the charge to be sustained
- **Ex.** Charge of “making threatening remarks about your supervisor and co-workers and using inappropriate language” needs every element of the charge to be proven, and the latter portion of it could not be analyzed independently.

Greenough v. Dept. of Army, 73 MSPR 648, 653-54 (1997).

Charge Label without Intent

- Example:

an agency may charge employee with failure to follow instructions rather than with insubordination, an offense requiring proof of intent.

“Loaded” Words

- Words implying intentional misconduct may require an agency to prove that element of intent.
- Board may examine the “structure and language of the proposal notice” to determine how charges are to be construed.
- Avoid these words – “knowingly,” “willfully,” “maliciously,” “intentionally,” or words referring to threats or intimidation.



Conduct Unbecoming

Doing Dumb Things

- Abusive to the Public
- Detention by local law enforcement with or without arrest
- Disrespectful conduct (rudeness, insolence, contempt, indifference)



Conduct Unbecoming

- Example – proof of intent not required

Cross v. Army, 89 M.S.P.B. 62 (2001). In a case where the manager changed a rating on another employee's performance evaluation and denied doing it, the Board held that the agency was entitled to use a general charge of conduct unbecoming a federal employee, rather than the charge of falsification.

Improper Associations

- Personal, unprofessional, or off-duty relationships with the “wrong” people (felons, aliens, informants, inmates, etc.).
- Such relationships or contacts innately undermine the credibility of agency or employee or both and bring public criticism.



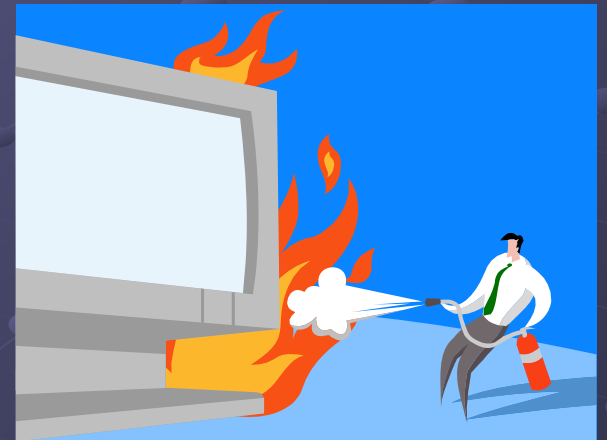
Charging Alternatives

- Poor Judgment
- Conduct Prejudicial to the Agency
- Failure to Follow Instructions or Policy



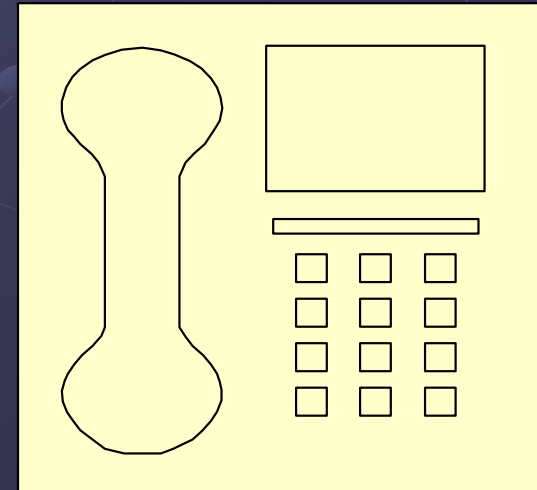
Misuse of Government Property

- Government Property is any form of real or personal property in which the gov't has an interest,
 - including office supplies
 - telephone and other telecommunications
 - equipment and services
 - government mails, printing facilities, and records
 - government vehicles.



Government Property

- Misuse or unauthorized use:
used for purposes other than those for which the property is made available to the public or other than those authorized by law, rule, or regulation.
- 5 C.F.R. § 2635.704



Intent

- Intent: is not an element of this charge.

Castro v. Dept. of Defense, 39 MSPR 555 (1989).

Exception: Agency charges willful or knowing misuse.

Penalty for Misuse



- Notice is not relevant to the charge but will be considered in determining reasonableness of the penalty. *Rogers v. Dept. of Justice*, 60 MSPR 377 (1994).
- Fact that employee did, or intended to, pay for the use of government equipment does not negate misuse. *Wenzel v. Dept. of Interior*, 33 MSPR 344 (1987).

De Minimis Value or Use

- a. De minimis value of item misused is a factor mitigating the penalty imposed. *Lovenduski v. Dept. of Army*, 64 MSPR 612 (1994).
- b. Will generally mitigate penalty *Winebarger v. TVA*, 22 MSPR 635 (1984).
- c. BUT, may not mitigate penalty when the employee has been previously disciplined for the same type of misconduct. *Cobb v. Dept. of the Air Force*, 57 MSPR 47 (1993).



Unauthorized Use of An Official Government Vehicle (GOV)

- Common categories of misconduct involving an GOV

1. Misuse
2. Improper Use
3. Unauthorized Use



Unauthorized Use *cont.*

- 31 U.S.C. § 1349(b) – imposes a minimum 30 day penalty for unauthorized use of an GOV.
- Conduct must be either willful or taken with reckless disregard
- Board often tries to avoid the statutory penalty in those cases when it is driven by compassionate or equitable reasons



Basic Questions

Was the employee utilizing the GOV on a folic or detour? There is no bright line test.

- *Kimm v. Treasury*, 61 F.3d 888, 891-92 (Fed. Cir. 1995). An employee violates §1349(b) if he “willfully” uses an GOV for non-official purposes.
- The employee’s actions are willful if he had actual knowledge that the use would be characterized as “non-official,” or if he acted in reckless disregard as to whether or not the use was for non-official purposes.



Improper Use

- Consider charging minor traffic offenses in a third separate category for employees who, while authorized to operate an GOV, do so in a negligent, reckless, or irresponsible manner.
- For example, employee receives speeding or parking tickets, or has an accident.



Failure to Follow Instructions

- Elements:

- A. Proper instructions were given to employee

- B. Employee failed to follow them

- Intent: is not an element of this charge.
Hamilton v. USPS, 71 MSPR 547 (1996).

Related Offenses

- Insubordination: willful and intentional refusal to obey an authorized order of a superior officer which the officer is entitled to have obeyed. *Phillips v. GSA*, 878 F.2d 370 (Fed. Cir. 1989).
- Insubordination/Failure to follow: when agency uses combined charge based on a single incident of misconduct, agency generally will be required to prove element of intent. *Hamilton v. USPS*, 71 MSPR 547, 556 n.5 (1996)

Poor Judgment

Example of charge-

- ⑩ Board sustained a charge of poor judgment where the appellant, a criminal investigator with the DEA, asked a personal friend to house an informant for a week.
- ⑩ It affirmed the admin judge's findings that the request, even if subsequently withdrawn, was inappropriate and could have jeopardized the informant's confidentiality. *Rackers v. DOJ*, 79 MSPR 262, 282 (1998).

Poor Judgment cont.

Alternative charge labels that also implicate poor judgment-

- “Failure to follow post orders”
- “Unprofessional Conduct”

False Statements

False statements during an administrative investigation.

- *Lachance v. Erickson*, 118 S. Ct. 753 (1998). Supreme Court determines that, under the due process clause, a Fed. Employee's right to be heard in a misconduct investigation does not include a right to make false statements concerning the misconduct.



False Statements *cont.*

- Perjury-- To prove misconduct, must be able to establish elements of the “crime.”
- Must be able to show intent and that “lie” was material to the matter at issue.
- 18 U.S.C. § 1001. False statement in a matter of official interest. Lower threshold than perjury.

Alternative Charges

- Submission of False, Misleading, or Inaccurate Statement (encompasses every possibility, i.e., intent, negligence, carelessness)
- Inattention to Duty, Failure to Follow Instructions, Conduct Unbecoming, Conduct Prejudicial

Lack of Candor

1. Focuses on an employee's duty to be forthcoming in responses with regard to all facts and information in their possession.

Frederick v. Justice, 52 MSPR 126, 133(1991).

2. *Ludlum v. Justice*, 87 MSPR 56, 63-70 (2000).

Criminal Conduct

- Crime exception: 5 U.S.C. 7513.
- Indefinite Suspension



Criminal Conduct *cont.*

- Discipline for misconduct

- Once appropriate, agency may discipline employee for underlying misconduct



Medical Inability/Unavailability

1. Employee physically or mentally unable to perform job
2. Fitness for Duty Exam – To order this Exam (medical or psychiatric), employee must be subject to a medical standard
3. Employee's medical condition is always relevant, even after the fact



Leave-Related Offenses

- Approved Leave



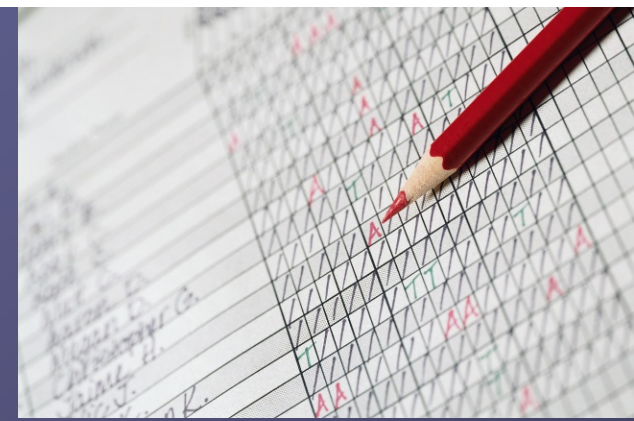
General Rule: An agency may not take an adverse action against an employee based on the employee's use of approved leave. *Webb v. USPS*, 10 MSPR 536 (1982)

Leave Offenses cont.

Exception: (Cook v. Army, 18 MSPR 61 (1984)) Removal for excessive absences will be sustained if:

1. The employee was absent for compelling reasons beyond his or her control making approval or denial of leave immaterial
2. Absence continued beyond a reasonable period of time and employee warned of possible adverse action
3. Agency shows that the position needs to be filled by an employee available for duty on a regular, full or part time basis.

AWOL



● Elements

- Employee was required to be at duty station
 - Employee was absent; and
 - Absence was not authorized or leave request was properly denied.
- The Board may sustain a charge of AWOL even when the agency fails to prove that the employee was AWOL for the entire period charged. *Senior v. USPS*, 85 MSPR 285 (2002).

Practice Notes

- Employee may defend against AWOL charge by presenting medical documentation to the Board that was not previously presented to the agency.
- Employee may establish entitlement to FMLA leave during period of AWOL

Failure to Follow Leave Requesting Procedures

- Agency has procedure requesting leave
 - Employee knew procedures
 - Employee failed to follow them
- ☯ Agency may remove employee for failure to follow leave requesting procedures even if it subsequently approves leave in question.



Wilkinson v. Air Force, 68 MSPR 4 (1995)



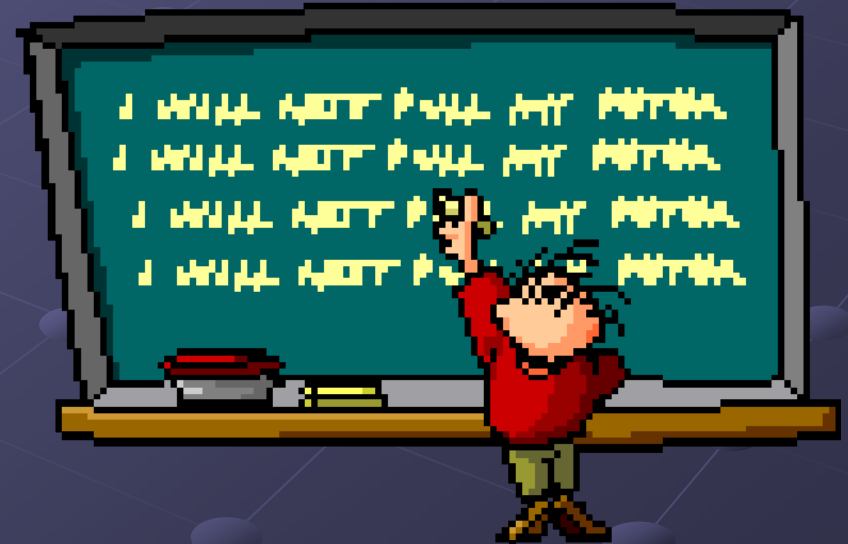
III. PENALTIES

An Overview

1. Mandatory to consider
2. Not all “Douglas” factors are applicable in every case
3. Fatal if appropriate review and reasoning is not conducted
4. Deciding official can mitigate penalty if appropriate
5. Best practice is to formally articulate consideration to factors

Past Discipline

- Has the employee done this particular conduct before?
- Has the agency cited the prior discipline in the proposal notice?



Other Aggravating Factors

- Effect upon confidence of employer
- Notoriety of Offense
- Clarity of notice of agency rules, policies, and procedures



Typical Mitigating Factors:



- Employee's work record
 1. Employee's past evaluations
 2. Employee's awards and accomplishments
- Consistency of penalty with those for other employees
- Potential for rehabilitation

Mitigating Circumstances

- Unusual job tensions
- Personality problems
- Mental Impairment
- Provocation, malice or bad faith on the part of others



Alternative Sanctions

- *Blake v. Department of Justice*, 81 MSPR 394, 414 (1999).



A. Other job series vs. removal?

B. Creative resolutions:
retraining, sensitivity classes

The background is a dark blue gradient with a subtle, repeating pattern of light blue dots connected by thin lines, creating a grid-like or molecular structure. The dots are arranged in a staggered, hexagonal pattern, and the lines connect them to form a series of overlapping triangles and hexagons. The overall effect is a textured, three-dimensional appearance.

CONCLUSION